APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of DEC two thousand and one.

Present: JAMES L. OAKES,
RICHARD J. CARDAMONE,
ROSEMARY S. POOLER,

Circuit Judges.

(01-6044)

SALVATORE J. PRESUTTI,

Plaintiff-Appellant,

-v-

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for the Bank of Hartford,

Defendant-Appellee.

Appendix A

Appearing for Appellant: John C. Peters, Avon, CT
Appearing for Appellee: John B. Farley, Halloran & Sage LLP, Hartford CT

Appeal from the United States District Court for the District of Connecticut (Thompson, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Salvatore J. Presutti appeals from an amended judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*) that set aside a jury verdict in Presutti's favor for conversion and violation of Connecticut's Unfair Trade Practices Act ("CUTPA") and from an order refusing to further amend the amended judgment.

In March 1988, the Bank of Hartford ("Bank") entered into a mortgage loan transaction with Presutti, Joseph P. Kennedy ("Kennedy"), and Joseph P. Kennedy, Trustee, for 825-829 Wetheresfield Avenue ("Premises").[1] In connection with the mortgage, the mortgagors executed a collateral assignment of leases and rentals, which listed Park Place Properties, Presutti's and Kennedy's partnership, as the ground floor tenant of the Premises. On June 6, 1993, the Bank commenced a foreclosure action against the mortgagors, and on November 2, 1993, title to the Premises vested in the Bank.

On December 1, 1992, following the mortgagors' default, the Bank entered into a contract with MC Building

1. We adopt the facts set forth in appellee's brief, which appellant does not dispute.

Services, Inc. ("MC") to manage and maintain the Premises. At that time, the ground floor of the Premises was equipped with a security alarm which Park Place Properties had purchased from Sonitrol, Inc. Presutti refused to give MC the security code needed to arm and disarm the system. Therefore, with the Bank's permission, MC had the alarm system repaired and arranged for Sonitrol to monitor the system. Presutti subsequently entered the premises, set off the alarm, and was confronted by a police officer.

In August 1993, Presutti filed a lawsuit for, among other things, conversion of the alarm system and violation of CUTPA in the Connecticut Superior Court. In 1995 the Federal Deposit Insurance Corporation ("FDIC"), as receiver for the Bank, removed the lawsuit to the federal district court.

A jury heard Presutti's claims and FDIC's defense between May 30 and June 6, 2000. At the close of plaintiff's proof, defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, and the court reserved decision. On June 6, 2000, the jury returned a verdict in favor of Presutti and awarded him damages of $1,129. The FDIC orally renewed its motion immediately following the jury verdict, and the court granted the FDIC permission to file its memorandum of law at a later date. On June 19, 2000, the FDIC filed a formal written motion supported by a memorandum of law. The next day, Presutti requested an extension of time to respond to the FDIC's motion. Judge Thompson granted the requested extension. On June 22, 2000, the Clerk entered judgment in Presutti's favor. Presutti moved for counsel fees and costs on July 5, 2000, and, on July 25, 2000, the FDIC requested that its time to respond to the attorney's fee motion be extended to twenty days after the court's decision on the Rule 50 motion. Presutti objected to the motion, arguing that the court already had

ruled on the Rule 50 motion by allowing judgment to be entered. The court granted an extension before receiving Presutti's objection.

On January 3, 2001, the court granted the FDIC's motion. It held that

> For the reasons set forth in Part I of the defendant's memorandum dated June 15, 2000, the plaintiff failed to establish an ownership interest in the property sufficient to support a claim for conversion; rather, as a matter of law, the plaintiff's evidence established that the security system was the property of a partnership, Park Place Properties.
>
> In addition, the defendant is entitled to judgment as a matter of law on the Eighth Count, the CUTPA claim, because in the absence of a showing that the defendant's actions constituted a conversion, there is no other conduct on the part of the defendant which could support a finding of a CUTPA violation.

An amended judgment reflecting this holding was entered on January 10, 2001. Presutti then moved for a second amended judgment, arguing that the FDIC did not make its motion in the time period required by Fed. R. Civ. P. 50, the court could not rely on Fed. R. Civ. P. 60, and the court made a legal error in determining that Presutti did not have a sufficient ownership interest to support a conversion claim. The court denied this request on January 22, 2001. It found that the FDIC "orally renewed its motion for judgment as a matter of law immediately following the jury verdict" and that "[t]he court did not rely on Rule 60."

On appeal, Presutti makes the counter-intuitive argument that the FDIC failed to make a timely motion because both its oral motion and its written motion were made before the entry of judgment. Rule 50(b) does not require that a motion be made after the entry of judgment; instead it provides that the non-prevailing party may file its "motion no later than 10 days after entry of judgment." As the Advisory Committee Notes for the 1995 amendments to Rule 50 state: "The phrase 'no later than' is used — rather than 'within' — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." Because the FDIC filed a written motion *before* the entry of judgment, its motion was timely.

Presutti also argues that entry of the June 22 judgment constituted a denial of the FDIC's earlier motion, requiring the FDIC to move against the judgment. This argument contradicts the record. As indicated by the chronology previously set forth, Judge Thompson did not regard the June 22 judgment as resolving the Rule 50 motion. Nor is there any indication in the record that Judge Thompson approved the form of the verdict pursuant to Rule 58(2) of the Federal Rules of Civil Procedure. Finally, Presutti does not offer any persuasive authority for his argument that the entry of judgment by a clerk disposes of a pending Rule 50 motion where it does not purport to address that motion.

Presutti next argues that the substance of the district court's holding was erroneous because (1) it contradicts the jury's specific finding that Presutti owned the alarm system in violation of the Seventh Amendment to the United States Constitution; (2) the FDIC itself argued that the arrangement between Presutti and Kennedy was a joint venture or agency agreement not a partnership; and (3) it is not necessary under Connecticut law to have title to property to recover for conversion.

Rule 50 specifically allows the district court to set aside a jury verdict if "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of surmise and conjecture." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). Granting a Rule 50(b) motion does not offend the Seventh Amendment "where the evidence, viewed most favorably to the party against whom the judgment is entered, would not be sufficient to support a verdict in that party's favor." *Shore v. Parklane Hosiery Co.*, 565 F.2d 815, 819 (2d Cir. 1977), *aff'd* 439 U.S. 322 (1979). Thus our task is to determine whether the district court correctly concluded that there was no evidence to support the jury's finding that Presutti owned the alarm system. We review the district court's decision *de novo* but use the same standards that it must apply. *United States v. Daccarett*, 6 F.3d 37, 59 (2d Cir. 1993).

Our review is complicated by plaintiff's failure to supply the trial transcript and to identify any facts overlooked by the district court that indicate the security system was owned by him individually rather than by Park Place Properties. Moreover, plaintiff accepts the FDIC's version of the facts, which includes assertions that Park Place Properties was a partnership between Presutti and Kennedy and that Park Place Properties purchased the security system. Instead of pointing to evidence in the record, Presutti relies on a portion of the FDIC's brief below as a concession that Presutti owned the alarm system. However, the cited portion of the brief addresses ownership of the building, not ownership of the security system. Therefore, Presutti's claim that the FDIC conceded his argument is disingenuous. We discern no basis for setting aside the district court's conclusion that Presutti's own proof established that the partnership owned the security system.

Presutti contends correctly that he need not prove that he held title to the security system in order to maintain a claim for conversion. *See Devitt v. Manulik*, 410 A.2d 465, 467 (Conn. 1979). However, the only basis other than absolute ownership that Presutti urged to the district court was that, as a partner in the partnership, he was an owner of the alarm system. This claim is contradicted by Connecticut law which provides that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." Conn. Gen. Stat. Ann. § 34-315 (1997). Although Presutti now suggests that there may be other interests sufficient to enable him to maintain a conversion action, we will consider an issue not passed on below only if it is purely legal and there is no need for fact finding or "consideration of the issue is necessary to avoid manifest injustice." *Krumme v. Westpoint Stevens, Inc.*, 238 F.3d 133, 142 (2d Cir. 1992) (internal quotation marks omitted). Because Presutti does not identify a legal issue that can be resolved on the record before us and there is no apparent basis for concluding that we must act to avoid a manifest injustice, we decline to address these additional arguments.

FOR THE COURT
ROSEANN B. MACKENCHNIE, Clerk
By: s/ Armstrong

APPENDIX B — ENDORSEMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 22, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO. 3:95CV00651 (AWT)

SALVATORE PRESUTTI,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD,

Defendant.

ENDORSEMENT ORDER

The plaintiff's motion to alter or amend the court's judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure [Doc. # 131] is hereby DENIED. As noted by the defendant in its objection [Doc. # 133], the defendant orally renewed its motion for judgment as a matter of law immediately following the jury verdict, and obtained permission to file subsequently its memorandum of law. The court did not rely on Rule 60.

It is so ordered.

Dated this 22nd day of January, 2001, at Hartford, Connecticut.

s/ Alvin W. Thompson
Alvin W. Thompson
United States District Judge

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 10, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:95CV651 (AWT)

SALVATORE J. PRESUTTI

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the BANK OF HARTFORD

AMENDED JUDGMENT

This action came before the court for a trial by jury before the Honorable Alvin W. Thompson, and the issues were duly tried. Counts two and six were dismissed on the first day of trial, and the jury rendered its verdict on the remaining counts. Judgment entered on June 22, 2000 for the plaintiff Salvatore Presutti, against the Bank of Hartford, in the amount of $1,129 in damages plus statutory interests, attorneys fees and costs.

Following the jury verdict, the defendant renewed its motion for judgment as a matter of law on the Fourth and eighth counts. The court granted the defendant's motion, and instructed the clerk to vacate the above judgment, and enter judgment in favor of the defendant in this case.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment of June 22, 2000 is hereby VACATED, and shall be amended as follows:

Appendix C

This action having come on for consideration of the defendant's motion for judgment as a matter of law following the jury verdict before the Honorable Alvin W. Thompson, United States District Judge and,

The court having considered the full record of this case including applicable principles of law, and having filed its order granting the defendant's motion and instructing the clerk to enter judgment in favor of the defendant; it is therefore,

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant Bank of Hartford.

Dated at Hartford, Connecticut, this 10th day of January, 2001.

KEVIN F. ROWE, Clerk

By s/ Sandra Smith
Sandra Smith
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 3, 2001

Civil Action: 3:95cv651 (AWT)

SALVATORE J. PRESUTTI,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD

Defendant.

ORDER

Following the jury's verdict, the defendant renewed its motion for judgment as a matter of law on the Fourth Count, which sets forth a claim for conversion of a security system, and the Eighth Count, which sets forth a claim under CUTPA. The defendant's motion for judgment as a matter of law on the Fourth Count should be granted. For the reasons set forth in Part I of the defendant's memorandum dated June 15, 2000, the plaintiff failed to establish an ownership interest in the property sufficient to support a claim for conversion; rather, as a matter of law, the plaintiff's evidence established that the security system was the property of a partnership, Park Place Properties.

In addition, the defendant is entitled to judgment as a matter of law on the Eighth Count, the CUTPA claim, because in the absence of a showing that the defendant's actions constituted a conversion, there is no other conduct on the part of the defendant which could support a finding of a CUTPA violation.

Appendix D

Accordingly, the judgment entered in favor of the plaintiff (doc. # 120) is hereby VACATED, and the clerk is ordered to enter judgment in favor of the defendant. In addition, the plaintiff's motion for costs and fees and for attorney's fees (doc. ## 122 and 126) and the plaintiff's motion for reconsideration (doc. # 125) are hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut this 3rd day of January 2001.

s/ Alvin W. Thompson
Alvin W. Thompson
United States District Judge

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JUNE 22, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:95CV-651

SALVATORE PRESUTTI

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for The Bank of Hartford

JUDGMENT

This action came before the court for a trial by jury before the Honorable Alvin W. Thompson, United States District Judge presiding, and the issues having been duly tried and the jury having rendered its verdict in favor of the plaintiff and against the defendant, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the plaintiff in the amount of $1,119 in compensatory damages and nominal damages on the CUTPA claim in the amount of $10, for a total of $1,129, plus statutory interest and attorney fees and costs.

Dated at Hartford, Connecticut, this 22nd day of June, 2000.

KEVIN F. ROWE, Clerk

By s/ Sandra Smith
Sandra Smith
Deputy Clerk

APPENDIX F — RELEVANT FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULE OF CIVIL PROCEDURE 50

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

Appendix F

(1) if a verdict was returned:

(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or
(B) direct entry of judgment as a matter of law.
(C) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment. (d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the

appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

FEDERAL RULE OF CIVIL PROCEDURE 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would

justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

FEDERAL RULE OF CIVIL PROCEDURE 60

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title *28, U.S.C., § 1655*, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.